Gary L. Graham, Esq.
GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine
P.O. Box 7909
Missoula, Montana 59807-7909
Telephone (406) 523-2500
Fax (406) 523-2595

Kenneth W. Lund, Esq.
Linnea Brown, Esq.
John D. McCarthy, Esq.
Katheryn Jarvis Coggon, Esq.
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
Telephone (303) 861-7000
Fax (303) 866-0200

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W.R. GRACE & COMPANY, W.R. GRACE & CO.-Conn., and KOOTENAI DEVELOPMENT CORPORATION, Defendants.	Civ. No. CV-01-72-M-DWM **DEFENDANTS' RESPONSE TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' THIRD AFFIRMATIVE DEFENSE**

Defendants W.R. Grace & Co., W.R. Grace & Co. – Conn., and Kootenai Development Company (collectively "Defendants") hereby respond to United States' Motion For Partial Summary Judgment On Defendants' Third Affirmative Defense, filed on October 11, 2002.

Statement of Facts and Standard of Review

Pursuant to L.R. 56.1(b), Defendants submit Defendants' Statement of Genuine Issues of Material Fact Related to United States Motion for Partial Summary Judgment on Defendants' Third Affirmative Defense ("GSF"). Defendants incorporate by reference the standard of review contained in their Response to United States' Motion For Partial Summary Judgment On Defendants' First and Fourth Affirmative Defenses.

Arbitrary and Capricious or Otherwise Not In Accordance with Law Standard

Under 42 U.S.C. § 9607(a)(4)(A), the government is limited to recovering **only** those costs of removal or remedial action that are not inconsistent with the national contingency plan (NCP). See United States v. Chapman, 146 F.3d 1166, 1169 (9th Cir. 1998). If a defendant demonstrates that the EPA's response action was arbitrary and capricious or otherwise not in accordance with law, it demonstrates inconsistency with the NCP. 42 U.S.C. § 9613(j)(2) (2002). Some courts have interpreted this as requiring them to determine "whether [the EPA] considered the relevant factors and articulated a rational connection between the facts found and the choice made." W.R. Grace & Co. v. U.S. EPA, 261 F.3d 330, 338 (3d Cir. 2001) (citations omitted). **Moreover, judicial review must be based on something more than trust and faith in the EPA's experience**. In re Bell Petro., 3 F.3d 889, 905 (5th Cir. 1993) (citations omitted); Asarco v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) (noting that it would often be impossible where highly technical matters were involved to determine whether the agency considered all relevant matters without going outside the administrative record).

Review of Agency Action

The United States makes too much of the Administrative Record and overstates the limits on this Court's function. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), U.S.C. 42 9601-9675, directs courts to apply general principles of

administrative law to determine whether any supplemental materials outside the administrative record may be considered by the court. 42 U.S.C. § 9613 (j)(1). The Ninth Circuit has explicitly allowed consideration of extra-record materials. Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998). Here, all four of the circumstances under which Courts may (and indeed should) consider extra-record materials exist. First, here review of extra-record materials is necessary to "determine whether the agency has considered all relevant factors and has explained its decision." Id. The reports of Defendants' experts provide numerous examples of information that EPA failed to consider (as well as failures to comply with EPA's own regulations and policies). In deciding this case, the Court should have the benefit of this information, even if EPA failed to consider it. Second, as here, when the agency has relied on documents not in the record the Court may (and again should) consider these extra-record materials. Id. Third, Courts regularly hear extra-record evidence when, as is clearly the situation in this case, extra-record testimony by Defendants' expert is necessary to explain technical terms or complex subject matter. Id. Fourth, and finally, consideration of extra-record materials is appropriate when the party challenging the agency action makes a showing of agency bad faith. As discussed below, here, EPA acted with intentional and knowing disregard of its own policies and treated Libby differently from other sites. EPA disregarded the statutory and regulatory requirements, which act to protect those from whom costs are later sought.

Instead of acting consistently with its legal obligations and its own policies and guidance, here EPA spent money without regard to being a careful steward of those funds and acted as one might act if one thought one's actions would not be scrutinized. Here, EPA mischaracterized its actions as time-critical removal actions when in fact they are neither removal actions nor time-critical. EPA accordingly failed to comply with the legal requirements associated with remedial actions as well as failing to comply with the more minimal requirements for non-time-critical removal actions. EPA exceeded the statutory and regulatory cap of $2 million and 12 months for

removal actions, without having the legally-required factual bases. EPA did not exceed the cap by a small amount – indeed EPA seeks to recover $57 million and seeks a declaratory judgment for the remaining $53 million that it anticipates. **Obviously something is wrong when an agency both fails to comply with the requirements of considering cleanup alternatives and costs and exceeds a $2 million cap by $108 million while at the same time incredibly claiming that the court may consider only the materials that the agency itself, after the fact, placed in the Administrative Records.**

Argument

I. EPA Failed to Comply with Applicable Law by Mischaracterizing Its Response Actions as Removal Actions and Thus Failed to Comply with the National Contingency Plan ("NCP").

EPA's response actions at Libby were predominantly remedial actions. However, by characterizing its actions as a "removal," EPA attempted to evade the safeguards provided for in the remedial process and did an end run around its legally-mandated requirement to consider a range of less costly but protective alternatives. By further characterizing its actions as a "time-critical" removal, EPA sought to avoid even the most basic of safeguards, the Engineering Evaluation/Cost Analysis ("EE/CA"), which would have provided EPA with information about risk, costs, and alternatives. Had EPA bothered to do an EE/CA (let alone an evaluation under the applicable remedial action provisions), its actions probably would not have been inconsistent with the NCP, violated the applicable law, or been arbitrary and capricious.

CERCLA distinguishes between two types of response actions for which costs may be recovered – remedial actions and removal actions. 42 U.S.C. § 9601(23), (24); Hatco Corp. v. W.R. Grace & Co.-Conn., 849 F. Supp. 931, 961 (D.N.J. 1994). Reflecting this distinction, the NCP "sets forth separate sets of compliance provisions for removal actions and for remedial actions." Hatco, 849 F. Supp. at 961; U.S. v. Taylor, No. 1:90:CV:851, 1993 U.S. Dist. LEXIS

190832 at *57 (W.D. Mich. Dec. 9, 1993). Remedial actions are subject to the stringent requirements of the NCP for planning, risk assessment, and public comment as set forth in 40 C.F.R. §§ 300.420, 300.425, 300.430, and 300.435, while removal actions are subject to more lenient requirements at for site assessment and other matters as set for in 40 C.F.R. §§ 300.410 and 300.415. **The delineation between removal and remedial actions "is crucial in certain cases where the failure to fulfill the more detailed procedural and substantive provisions of the NCP with regard to 'remedial' actions becomes a barrier to recovery of response costs."** Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1576 (E.D. Pa. 1988). This case is such a case.

The general rule is that "removal actions are designed for short-term or interim cleanup measures, and remedial actions involve long-term or permanent measures." Hatco, 849 F. Supp. at 962 (citing United States v. Alcan Alum. Corp., 964 F.2d 252, 259 n.10 (3rd Cir. 1992)). See also Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 801, n.6 (9th Cir. 1995). Stated another way, a removal action is "the immediate response to an emergency situation, the remedial action being a thought-out response, directed to a permanent solution and preventing future releases." U.S. Steel Supply, Inc. v. Alco Standard Corp., No. 89 C 20241, 1992 U.S. Dist. LEXIS 13722 at *26 (N.D. Ill. Sept. 9, 1992); see also National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (Mar. 8, 1990) (stating that "removals are distinct from remedial actions in that they may mitigate or stabilize the threat rather than comprehensively address all threats at a site").

Courts examining the removal/remedial distinction have applied a variety of tests. Some courts focus on the urgency of the response action. Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 385 (E.D.N.C. 1990). Other courts focus on the nature of the

response action, whether permanent or temporary. Versatile Metals, 693 F. Supp. at 1576. A number of courts apply a multi-factor test examining: (1) the cost and duration of a response action; (2) the exigency of the release or threat of release; (3) the complexity of the actions taken; and; (4) the nature of the actions taken. U.S. Steel Supply Inc., 1992 U.S. Dist. LEXIS 13722 at **28-29. See also Hatco, 849 F. Supp. at 963; Raytheon Constructors, Inc. v. ASARCO Inc., No. 96 N 2072, 2000 U.S. Dist. LEXIS 6069 at **43-46 (D. Colo. Mar. 31, 2000); G.J. Leasing, Co., Inc. v. Union Electric, 854 F. Supp. 539, 564-65 (S.D. Ill. 1994). Although Courts traditionally have applied these in private party actions, the rationale behind application of these factors applies equally to review of agency choice of response action.[1]

EPA does not dispute that it did not comply with the NCP provisions applicable to remedial actions. GSF ¶15. Importantly, EPA could not legally conduct remedial actions at Libby because it failed to list Libby on the National Priorities List ("NPL") until just recently. GSF ¶16. EPA can spend its remedial funds only on sites listed on the NPL. 40 CFR § 300.425(b) (2002). Thus, EPA had a motivation to stretch the limits of its removal authority however it could in order to spend funds at Libby – without having listed Libby on the NPL - and to avoid complying with the procedural safeguards applicable to remedial actions.

Examining EPA's actions under the multi-factor test, the facts show that the vast majority of EPA's actions were actually remedial actions that did not comply with the NCP and that EPA's actions at Libby were by and large not removal actions. For example, EPA's excavating 250,000 cubic yards of soil at depths of 13 feet, as well as the demolition of all of the structures

[1] 40 C.F.R. § 300.700(c)(5)(vi), which governs private party recovery actions, requires that private parties consider the same factors set forth in 40 C.F.R. § 300.415(b)(2) that an agency must consider in determining whether there is a threat warranting a removal response action.

on the Parker property were classic remedial actions.[2] The massive earth-moving projects (the cost of which exceed $25 million) bear no resemblance to any form of temporary action that might be taken to protect human health while an appropriate evaluation of risks, cleanup alternatives, and costs was conducted. GSF ¶ 32. Instead, EPA here spent $57 million and intends to spend another $53 million conducting a full remedial action without the legally-required procedural safeguards. GSF ¶¶ 9, 129. As such, EPA's response costs are not in accordance with law and are inconsistent with the NCP.

In addition to the permanency of EPA's actions, they were not removal actions because of their duration, cost, complexity, and type of risk being addressed. GSF ¶¶ 7-14, 17-39. So far, EPA has been at work in Libby for over three years and expects to be there much longer taking various actions. GSF ¶ 14. The actions taken and to be taken are hugely expensive ($110 million by EPA's own estimate). GSF ¶ 10. The actions have proven to be complex and not a simple removal of drums or putting a fence around a pile. GSF ¶¶ 23-28. By contrast, in Hatco the court found that removal of a 400- by 300-foot area of contamination, which was visually

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[2] During his deposition, EPA's On-Scene Coordinator took substantial time to explain the complexities of EPA's soil removal criteria – 18 inches under some circumstances, 4 feet under others, using laboratory analysis as the standard for some situations and in some others using visual observation for tiny chips of vermiculite. GSF ¶ 29. These criteria are dramatically different from those for the Export Plant. GSF ¶ 18. This discrepancy also shows the arbitrary and capricious nature of EPA's action. In addition, EPA has spent huge amounts bringing fill soil onto the Parker property only to remove it the next year and replace it. GSF ¶ 17. EPA did extensive work on the river front – installing thousands of cubic yards of rocks, steps down to the river, as well as completely re-doing the Rainy Creek streambeds through the Parker property, including new fish pools. GSF ¶ 17. As the court noted in Raytheon Constr., Inc. v. ASARCO, Inc., 2000 U.S. Dist. LEXIS 6069 at **54-60, rehabilitation, re-seeding and re-planting of creek channels, grading and compaction of soils in excavation areas, riparian restoration, and installation of storm water and sediment controls are activities that are permanent in nature and therefore remedial.

identifiable, was a simple task and therefore properly classified as a removal action. 849 F.Supp. at 963. The vast majority of EPA's actions in Libby are remedial actions, and as such are subject to legal requirements with which EPA admittedly did not comply. Thus, EPA's actions are arbitrary and capricious and not in accordance with applicable law.

II. EPA's Exceeding the $2 Million/12-Month Statutory Limit on Removal Actions Was Arbitrary and Capricious and Not in Accordance with the Law.

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") made removal actions subject to a $1 million statutory limit and required that they be completed within 6 months of initiation. Pub. L. No. 99-499, § 1, 100 Stat. 1613 (1986). Later, Congress increased the removal spending limit to $2 million and the time limit to 12 months. 42 U.S.C. § 9604(c)(1). By law, these limits may be exceeded only under exceptional circumstances, such as if "(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency [and] (ii) there is an immediate risk to public health or welfare or the environment." Id. (emphasis added). See also 40 C.F.R. § 300.415 (b)(5). As stated in the Congressional Report:

> In granting the flexibility to apply increased limits in structuring emergency removals, and granting exceptions even to those limits in unusual cases, we do not intend to encourage any shift in the focus of the program toward such activities. Removal should remain interim and relatively short-term and inexpensive actions or urgent responses, which consume a small portion of Superfund resources. The new, more flexible authority is not to be abused to circumvent the more rigorous and explicit requirements regarding public participation and health standards. Finally, while the President is accorded greater flexibility in undertaking removals, the law's fundamental requirement that human health and the environment be protected must nonetheless be satisfied. The flexibility is merely procedural in nature, not substantive.

99 Cong. Rec. 14896 (daily ed. Oct. 3, 1986) (statement of Mr. Stafford, Chairman of the Committee on Environment and Public Works).

EPA On-Scene Coordinators prepare Action Memoranda that "must document consideration of the factors affecting the removal decision" and "substantiate the need for a removal action based upon criteria in the ...NCP [300.415(6)(2)]," even when not seeking an exemption from the cap. EPA, Action Memorandum Guidance at iii (Dec. 1990) (OSWER 9360.3-01), Exh. A. Here, the Action Memoranda failed to provide critical information, causing the approval of them without EPA's having considered the relevant factors and based on blatant misinformation. See, e.g., GSF ¶¶ 71-73. Thus, the selection of those response actions were inconsistent with the NCP.

The content and the accuracy of EPA's three Action Memoranda are even more important because they served the function of purportedly documenting the basis for exceeding the $2 million/12 month removal action ceiling. EPA now seeks to use these three incomplete, misleading, and error-filled Action Memoranda to justify its exceeding the ceiling and to preclude this Court from an appropriate review of EPA's actions. EPA's guidance emphasizes the different, higher standard that applies to exceeding the ceiling and obtaining the desired Emergency Exemption. "Note that a higher threshold is used to evaluate emergency exemption requests than for responses within statutory limits or consistency exemptions." Action Memorandum Guidance at 28. The EPA Guidance highlights the emergency, immediate nature of the risk that must be present in order to satisfy this statutory exemption. In discussing the required boiler plate section titled "There is an immediate risk to public health or welfare or the environment," the Guidance emphasizes: "the key word, being immediate: focus on how soon the public or the environment is at risk or will be in the immediate future. Describe site conditions that constitute an immediate risk...define the immediacy of the risk to affected human populations." Id. In contrast to the situation here, the examples in the Guidance Document are

very immediate emergencies: a lagoon, which contains 20,000 gallons of waste with the lagoon wall, expected to collapse within 4-6 weeks. Id.

EPA nationwide has adopted a policy that cancer risks in the range of 1 out of 10,000 (which is expressed as 10^{-4} or sometimes as 10E-4) to 1 out of 1,000,000 (10^{-6} or 10E-6) are acceptable and do not require EPA CERCLA action. 55 Fed. Reg. 8694, 8717 (Mar. 8, 1990). Here, initially EPA acted consistently with this national policy by adopting in its Sampling Quality Assurance Project Plan ("SQAPP") a decision rule that stated that it would only consider actions if risks were greater than 1 out of 1,000 or 10^{-3}. GSF ¶ 125. But then, despite this national policy and despite the SQAAP, at Libby EPA took action here under the guise of a public health emergency when the risks were within the EPA defined acceptable range. GSF ¶¶ 107-108.

EPA's Action Memoranda fail to mention the absence of human receptors – of actual people who could be exposed to asbestos – at either the Bluffs or the Flyways. GSF ¶¶ 71, 73. EPA does this sleight of hand by defining the Screening Plant as including both the Bluffs and the Flyways and then discussing the Parkers who live at the Screening Plant. GSF ¶ 49. By EPA's own estimates they spent well in excess of $5 million under a supposed Emergency Exemption digging up property where no one worked or lived or otherwise had any immediate way to come into contact with asbestos. EPA dug up the forest and now wants Defendants to pay. Had EPA done an EE/CA they would never have incurred these costs. Similarly, once EPA fenced the Parker property and relocated the Parkers there was no emergency to take any further action until a proper EE/CA or remedial evaluation was done.

EPA's Second Action Memorandum proposed expanding the Emergency Exemption at the Screening Plant as well as to numerous other properties was based on flatly incorrect

statements of the sampling data. Second Action Memorandum at 19; GSF ¶¶ 115, 116. In his deposition, when confronted with the overstatement of the data by a factor of 3.6, Chris Weis, whose risk assessment EPA used to justify its Second Action Memoranda, could not provide any explanation for the overstatement. GFS ¶ 115. This incorrectly-stated result was the only direct preparation sample and thus was the only basis for his risk assessment. GFS ¶ 115. All of the other samples were indirect preparation, which, as discussed, below cannot be used. GFS ¶ 115.

EPA's Third Action Memorandum was based on incredible errors in the data and in the resulting calculations, as EPA finally, begrudgingly admitted in September 2002. GFS ¶¶ 102, 116. EPA, despite its public *mea culpa* on the fatally flawed data, still has failed to provide to this Court, place in the Administrative Record, or provide to Defendants the revised risk calculations that underlie its Third Emergency Exemption request. GFS ¶¶ 103, 131. However, Defendants' experts have recalculated the risks and they are within EPA's national policy of acceptable risk. GSF ¶ 107. Thus EPA's use of those data and miscalculated risks as the basis for its Emergency Exemption (and even for any removal actions) is arbitrary and capricious.

Defendants' expert reports, including their discussion of the documents in the Administrative Record, of the issues that EPA failed to consider, the glaring errors made by EPA, and EPA's extensive failures to comply with its own policies, provide a more complete view of why EPA's actions were arbitrary and capricious and not in accordance with the law – especially as to EPA's exceedance of the $2 million/12 month cap. GFS ¶¶ 3, 5. No public health emergency or immediate risk existed in Libby in 1999-present. EPA's Action Memoranda and Administrative Records cannot change this reality. EPA abused its discretion in order to circumvent the rigorous requirements that would have safeguarded Defendants' rights.

III. EPA's Decision To Initiate As "Time-Critical" Removal Was Arbitrary and Capricious and Not in Accordance with Law.

EPA Guidance states that "experience has demonstrated that not all actions classified as removals under the NCP will be equally urgent. For example, situations involving fire/explosion or imminent, catastrophic contamination of a reservoir may require more prompt and expeditious attention than certain drum removals or cleanups of surface impoundments." EPA, Superfund Removal Procedures (1988) at III.5 (OSWER Directive 9360.03B), Exh. B. EPA then provides three types of removal actions: classic emergencies, time-critical, and non-time critical. The Guidance emphasizes the importance of determining "how urgent the response is (i.e., the maximum time that may elapse between approval of the action and initial response without posing additional significant risks to human health... .) Id. This estimate is essential for determining ...whether an EE/CA must be conducted." A non-time-critical removal action occurs when there is a planning period of at least six months before on-site activities must be initiated at a site. 40 C.F.R. § 300.415(b)(4). Where a non-time-critical removal action is undertaken, EE/CA must be prepared. Id. § 300.415(b)(4)(i). In the instant case, by characterizing its actions as a time-critical removal, EPA attempted to avoid having to prepare an EE/CA and sought to minimize its evaluation of risk before launching its now $110 million response action. EPA's position on its failure to prepare EE/CAs for the various areas of concern at Libby (e.g., the Bluffs, the Flyway, the Parkers property, etc.) is particularly egregious. **The EPA On-Scene Coordinator admitted in his deposition that he never even considered preparing one**. GFS ¶ 128. The fundamental procedural safeguards provided for removal actions – that of an evaluation of alternative actions and assessments of costs – was not even considered by EPA at any time at Libby. EPA has been taking actions at Libby now for

three years. GFS ¶¶ 11, 12. EPA would like this Court to rubber-stamp their failure to at any time, even during the three winters that have now passed, to prepare EE/CAs as required by law.

IV. The United States' Motion Repeats the Errors in Its Decision-Making Process at Libby and Continues to Create Strawmen Rather Than Accurately Stating Defendants' Positions and Responding to Those Legitimate and Fundamental Positions on the Role of Historic Exposures, Evaluation of Risk, and Scientifically Unacceptable Analytical Work by EPA

As presented in Defendants' expert reports and in those experts' depositions, Defendants have serious, substantial, and legitimate bases for its position in this case that EPA's actions were arbitrary and capricious or otherwise not in accordance with the law. However, when discussing Defendants' positions on these issues, the United States repeatedly misstates Defendants' position, sets up strawmen, and then addresses those imaginary positions instead of those that the Defendants are actually taking.

A. EPA's Use of Historic Exposures and Associated Disease Demonstrate Its Failure to Comply with the NCP and Applicable Law

Unlike the situation during the decades of operations in Libby, EPA has in the last 15 years developed scientifically-accepted methodologies for quantifying the risks presented by asbestos exposure. GFS ¶ 112. These methods draw upon the extensive and peer-reviewed scientific literature on human epidemiology studies, including three conducted historically in Libby. GFS ¶ 113. These studies provide the basis for EPA's development of an asbestos "slope factor" in its Integrated Risk Information System ("IRIS") – a system that EPA uses nationwide for a wide variety of compounds in calculating risk and determining whether exposures are "acceptable"or "unacceptable." GFS ¶ 114. In our society, we are subject to risks in thousands of ways in our daily lives – in breathing the air pollution from our cars and from breathing benzene (a known liver carcinogen) whenever we fill our cars with gasoline. Some risks we impose upon ourselves (self-serve gasoline) and others are imposed upon us (air pollution). We

look to EPA to determine in a fair and scientifically-based manner which risks are acceptable and which are not. When EPA did its investigation in late 1999 through the present in Libby, EPA allowed the past tragedies of high exposures (now being manifested 20 – 40 years later) to obscure its responsibility to determine fairly and scientifically the current exposures and the current risks and whether they were acceptable under EPA policies. As a result, EPA failed to do what we rightly expect of it and that which it must do by law.

In all of its Action Memoranda and throughout its Administrative Records, EPA spends much time discussing the historic exposures that occurred while the mine and other facilities operated. Historic concentrations were in the range of 1,000 times higher than those in 1990-present. GFS ¶¶ 89,90. EPA however fails to use those historic exposures in a scientifically-accepted manner. GFS ¶ 88. At Libby, EPA failed to use its own risk calculations and risk methodologies for decision making and instead simply took the unique position, contrary to its own policies, that the mere presence of asbestos is an unacceptable risk. GFS ¶ 30,.97. Nothing could be further from the truth. **Defendants in this case are entitled to have the United States apply its policies and risk methodologies even-handedly and not to be subject to an ad hoc "special Libby-only" punitive government action. As demonstrated by EPA's own regulations and defendants' expert reports, especially that of Suresh Moolgavkar, Libby asbestos is no more toxic than any other form of asbestos to which EPA applies its IRIS methodology.** GFS ¶ 121. The United States' failure to properly use its own scientifically-accepted risk paradigm, discussed by Dr. Anderson in both her expert report and her deposition, renders EPA's actions at Libby arbitrary and capricious and not in accordance with law.

EPA also relies upon the ATSDR Mortality and Screening Studies. Again, however, these studies do not provide information about the present exposures or the actions that should be

taken. GFS ¶¶ 93-96. These studies document the consequences of the unfortunate history of Libby – a history which occurred before EPA and the scientific community developed the national polices, scientific methodologies and expertise to quantify and assess risk in the manner that now can be done. Id. The ATSDR studies do not address the present exposures or the present risk. Use of them by EPA to justify its response actions is arbitrary and capricious and inconsistent with EPA's policies and guidance.

EPA also makes an outrageous argument that Defendants wish to "wait and see" what health results are produced by current exposures in Libby, a course of inaction that, according to EPA, would result in tragic, avoidable deaths. Pl. Br. at 16. This false *ad hominem* attack demonstrates the very problem that brought Defendants to this Court rather than reaching a resolution – the United States refuses to consider the scientific issues raised by Defendants. Instead, throughout the last three years, the United States has seen fit to mischaracterize Defendants' positions in this inflammatory manner. Environmental science has provided tools for determining current exposure levels, and for calculating health risks based on these exposure levels. Defendants had every reason (and the right) to expect that EPA would use these methodologies. EPA did not.

B. EPA Arbitrarily and Capriciously Relied upon Flawed and Erroneous Methodologies

A significant reason behind EPA's conduct and mischaracterization of the risk at Libby is that EPA failed to perform its sampling and analysis functions properly. As described in the GSF, EPA's underlying data are fatally flawed and despite numerous attempts EPA still does not have an accurate database of its sampling and analytical results. Its data are the antithesis of science – they are non-reproducible, ignored or dismissed by EPA when inconvenient, and misinterpreted by EPA in its quest to use its amphorphous "special Libby approach." EPA

breezily dismisses Defendants' well-founded objections and comments on EPA's sampling, analytical results, data reporting, and data interpretation. However, two of the foremost asbestos analysts in the world have offered expert reports in this case, including statements by Eric Chatfield, the analyst who developed the very method that EPA relies upon, that EPA is flat wrong. Apparently, EPA believes that its off-hand dismissal should suffice for the Court's review. However, as the Ninth Circuit has noted, a Court "cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980).

A few of the numerous fundamental errors made and flawed methodologies used by EPA are the following:

1. EPA has now admitted pervasive errors in its "All-PCME" database table and subsequent risk calculations for the residential scenarios presented in the December 2001 Weis risk memorandum, on which EPA based its Third Action Memorandum. GFS ¶ 102. Despite admitting these errors, however, EPA coyly failed to provide revised risk calculations – instead choosing to characterize the differences as "non-trivial." GFS ¶ 117. This gamesmanship does not speak well of an agency that seeks to have this Court defer to its scientific expertise. Defendants' expert, Elizabeth Anderson, was able to make the revised calculations based on the revised data and submitted them to this Court. Anderson Expert Report, September 2, 2002.

2. EPA supported its risk assessments in its Second Action Memorandum on data produced by indirect sampling. GFS ¶ 115. On October 22, 2002, Judge Randall J. Newsome of the United States Bankruptcy Court for the District of Delaware issued a Findings of Fact and Conclusion of Law in In re Armstrong World Industries, Case No. 00-04471 (RJN), in which he found, as a matter of law, **that methods to correlate levels of asbestos found in dust with**

respirable fibers in the air through the use of indirect sampling were not scientifically valid ways to quantify the level of asbestos contamination in a room, and thus were inadmissible under the Daubert standard.

3. EPA counted cleavage fragments in its fiber counts and used those higher counts in its IRIS calculations even though EPA elsewhere acknowledged that cleavage fragments should not be counted in using IRIS. GSF ¶ 111.

IV. Defendants Have Strong Basis for Their Third Defense – In Fact, EPA's Actions Were Inconsistent with the NCP.[3]

Under the NCP, EPA is required to consider the factors listed in 40 C.F.R. § 300.415(b)(2) before it can determine pursuant to 40 C.F.R. § 300.415(b)(1) that there is a threat to public health or welfare or the environment. In the instant case, EPA has not provided the factual bases for its actions in the Administrative Record, and has relied instead upon conclusory statements. Two examples of many follow.

In its Motion, EPA cites its analysis of the threat to human health in the Second Action Memorandum as an example of its method of applying facts to 40 C.F.R. § 300.415(b)(1). Pl. Br. at 11. In the example, EPA cites its sampling data which showed amphibole asbestos concentrations in surface soils at Plummer Elementary School between 3% and 8%. Id. Plaintiff also claims that EPA personnel observed children in that area. Id. Then, rather than making a rational connection between the existence of asbestos fibers in soil and a health risk to children,

[3] In addition, EPA acted inconsistently with the NCP in various matters associated with its costs, including documentation, indirect costs, and specific actions as discussed at length in Defendants' Response to the United States Motion re Response Costs. EPA also violated Defendants' procedural due process rights. See generally, United States v. Iron Mountain Mines, Inc., 987 F.Supp. 1250 (E.D. Cal. 1997).

EPA makes a conclusory statement that "there is substantial information in the admin record that disturbance for contaminated soils can cause asbestos fibers to become airborne." Id. EPA supports this conclusory statement with a reference to a supposedly "uncontroverted fact" A.R. Fact 39, which in turn, repeats the above conclusory statement and cites to the August 17, 2001 Action Memorandum Amendment ¶ 15. The cited paragraph of the Action Memorandum Amendment merely restates the same conclusory statement. This circular litany of citations does not lead to any supporting facts or demonstrate any rational connection between the facts cited by EPA and the response action selected. Chris Weis admitted in his deposition that he did not use PLM asbestos counts from soil for the purpose of risk assessment, and that there was no correlation between dust samples and air samples. GSF ¶¶ 83, 127. The admitted lack of any correlation between soil asbestos and airborne asbestos (and thus to risk) is a critical fact at Libby. EPA took action based on soil concentrations even while admitting no correlation to exposure or risk. This discrepancy is a key failure by EPA.

EPA also undertook actions that bore no relation to their own claims of a threat. At the Screening Plant, EPA excavated soil to a depth of 13 feet in some areas. GSF ¶ 31. However, Weis, the Regional Toxicologist, stated in his deposition that "what's 4 feet down doesn't really interest me in terms of risk calculations." GSF ¶ 118. Paul Peronard stated in his deposition that he had no idea what difference it would make in terms of risk by taking off the top foot of soil as compared to the top two feet, the top three feet, or the top four feet. GSF ¶ 119. In other words, EPA had no basis or rationale for excavating soil to the depths the excavated in Libby, yet did so anyway. These excavations are the very definition of arbitrary and capricious, and Plaintiff should not recover any costs associated with such actions.

Conclusion

For the reasons set forth above, substantial material issues of fact remain regarding whether EPA's actions were not inconsistent with the NCP. Grace has presented substantial evidence both from the administrative record and in the form of expert testimony that shows that EPA failed to articulate a rational connection between the facts found and the choices made, failed to comply with its own policies and regulations, and acted in an arbitrary and capricious manner or otherwise not in accordance with applicable law.

WHEREFORE, Defendants respectfully request that the Court deny the United States' Motion for Partial Summary Judgment on Defendants' Third Affirmative Defense.

Respectfully submitted this 31st day of October 2002.

Linnea Brown

Linnea Brown
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
(303) 861-7000

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine, P.O. Box 7909
Missoula, MT 59807-7909
(406) 523-2500
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2002, true and correct copies of the foregoing **DEFENDANTS' RESPONSE TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' THIRD AFFIRMATIVE DEFENSE** were served to the following via:

Hand Delivery:

Walker Smith, Deputy Chief
Environmental Enforcement Sec.
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

James D. Freeman, Trial Attorney
Heidi Kukis, Trial Attorney
David Askman
Environmental Enforcement Sec.
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

John C. Cruden
Acting Assistant Attorney General
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

Matthew D. Cohn
Andrea Madigan
Enforcement Attorneys
U.S. EPA Region 8
999 Eighteenth Street, Suite 300
Denver, CO 80202

Overnight Mail:

William W. Mercer
United States Attorney
Victoria Francis
Assistant United States Attorney
District of Montana
2929 Third Ave. N., Suite 400
Billings, MT 59101

Katherine Louis Cozzens

Gary L. Graham, Esq.
GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine
P.O. Box 7909
Missoula, Montana 59807-7909
Telephone (406) 523-2500
Fax (406) 523-2595

Kenneth W. Lund, Esq.
Linnea Brown, Esq.
John D. McCarthy, Esq.
Katheryn Jarvis Coggon, Esq.
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, Colorado 80203
Telephone (303) 861-7000
Fax (303) 866-0200

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W.R. GRACE & COMPANY, W.R. GRACE & CO.-Conn., and KOOTENAI DEVELOPMENT CORPORATION, Defendants.	Civ. No. CV-01-72-M-DWM **DEFENDANTS' RESPONSE TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' THIRD AFFIRMATIVE DEFENSE**

Defendants W.R. Grace & Co., W.R. Grace & Co. – Conn., and Kootenai Development Company (collectively "Defendants") hereby respond to United States' Motion For Partial Summary Judgment On Defendants' Third Affirmative Defense, filed on October 11, 2002.

Statement of Facts and Standard of Review

Pursuant to L.R. 56.1(b), Defendants submit Defendants' Statement of Genuine Issues of Material Fact Related to United States Motion for Partial Summary Judgment on Defendants' Third Affirmative Defense ("GSF"). Defendants incorporate by reference the standard of review contained in their Response to United States' Motion For Partial Summary Judgment On Defendants' First and Fourth Affirmative Defenses.

Arbitrary and Capricious or Otherwise Not In Accordance with Law Standard

Under 42 U.S.C. § 9607(a)(4)(A), the government is limited to recovering **only** those costs of removal or remedial action that are not inconsistent with the national contingency plan (NCP). See United States v. Chapman, 146 F.3d 1166, 1169 (9th Cir. 1998). If a defendant demonstrates that the EPA's response action was arbitrary and capricious or otherwise not in accordance with law, it demonstrates inconsistency with the NCP. 42 U.S.C. § 9613(j)(2) (2002). Some courts have interpreted this as requiring them to determine "whether [the EPA] considered the relevant factors and articulated a rational connection between the facts found and the choice made." W.R. Grace & Co. v. U.S. EPA, 261 F.3d 330, 338 (3d Cir. 2001) (citations omitted). **Moreover, judicial review must be based on something more than trust and faith in the EPA's experience**. In re Bell Petro., 3 F.3d 889, 905 (5th Cir. 1993) (citations omitted); Asarco v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980) (noting that it would often be impossible where highly technical matters were involved to determine whether the agency considered all relevant matters without going outside the administrative record).

Review of Agency Action

The United States makes too much of the Administrative Record and overstates the limits on this Court's function. The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), U.S.C. 42 9601-9675, directs courts to apply general principles of

administrative law to determine whether any supplemental materials outside the administrative record may be considered by the court. 42 U.S.C. § 9613 (j)(1). The Ninth Circuit has explicitly allowed consideration of extra-record materials. Northcoast Envtl. Ctr. v. Glickman, 136 F.3d 660, 665 (9th Cir. 1998). Here, all four of the circumstances under which Courts may (and indeed should) consider extra-record materials exist. First, here review of extra-record materials is necessary to "determine whether the agency has considered all relevant factors and has explained its decision." Id. The reports of Defendants' experts provide numerous examples of information that EPA failed to consider (as well as failures to comply with EPA's own regulations and policies). In deciding this case, the Court should have the benefit of this information, even if EPA failed to consider it. Second, as here, when the agency has relied on documents not in the record the Court may (and again should) consider these extra-record materials. Id. Third, Courts regularly hear extra-record evidence when, as is clearly the situation in this case, extra-record testimony by Defendants' expert is necessary to explain technical terms or complex subject matter. Id. Fourth, and finally, consideration of extra-record materials is appropriate when the party challenging the agency action makes a showing of agency bad faith. As discussed below, here, EPA acted with intentional and knowing disregard of its own policies and treated Libby differently from other sites. EPA disregarded the statutory and regulatory requirements, which act to protect those from whom costs are later sought.

Instead of acting consistently with its legal obligations and its own policies and guidance, here EPA spent money without regard to being a careful steward of those funds and acted as one might act if one thought one's actions would not be scrutinized. Here, EPA mischaracterized its actions as time-critical removal actions when in fact they are neither removal actions nor time-critical. EPA accordingly failed to comply with the legal requirements associated with remedial actions as well as failing to comply with the more minimal requirements for non-time-critical removal actions. EPA exceeded the statutory and regulatory cap of $2 million and 12 months for

removal actions, without having the legally-required factual bases. EPA did not exceed the cap by a small amount – indeed EPA seeks to recover $57 million and seeks a declaratory judgment for the remaining $53 million that it anticipates. **Obviously something is wrong when an agency both fails to comply with the requirements of considering cleanup alternatives and costs and exceeds a $2 million cap by $108 million while at the same time incredibly claiming that the court may consider only the materials that the agency itself, after the fact, placed in the Administrative Records.**

Argument

I. EPA Failed to Comply with Applicable Law by Mischaracterizing Its Response Actions as Removal Actions and Thus Failed to Comply with the National Contingency Plan ("NCP").

EPA's response actions at Libby were predominantly remedial actions. However, by characterizing its actions as a "removal," EPA attempted to evade the safeguards provided for in the remedial process and did an end run around its legally-mandated requirement to consider a range of less costly but protective alternatives. By further characterizing its actions as a "time-critical" removal, EPA sought to avoid even the most basic of safeguards, the Engineering Evaluation/Cost Analysis ("EE/CA"), which would have provided EPA with information about risk, costs, and alternatives. Had EPA bothered to do an EE/CA (let alone an evaluation under the applicable remedial action provisions), its actions probably would not have been inconsistent with the NCP, violated the applicable law, or been arbitrary and capricious.

CERCLA distinguishes between two types of response actions for which costs may be recovered – remedial actions and removal actions. 42 U.S.C. § 9601(23), (24); Hatco Corp. v. W.R. Grace & Co.-Conn., 849 F. Supp. 931, 961 (D.N.J. 1994). Reflecting this distinction, the NCP "sets forth separate sets of compliance provisions for removal actions and for remedial actions." Hatco, 849 F. Supp. at 961; U.S. v. Taylor, No. 1:90:CV:851, 1993 U.S. Dist. LEXIS

190832 at *57 (W.D. Mich. Dec. 9, 1993). Remedial actions are subject to the stringent requirements of the NCP for planning, risk assessment, and public comment as set forth in 40 C.F.R. §§ 300.420, 300.425, 300.430, and 300.435, while removal actions are subject to more lenient requirements at for site assessment and other matters as set for in 40 C.F.R. §§ 300.410 and 300.415. **The delineation between removal and remedial actions "is crucial in certain cases where the failure to fulfill the more detailed procedural and substantive provisions of the NCP with regard to 'remedial' actions becomes a barrier to recovery of response costs."** Versatile Metals, Inc. v. Union Corp., 693 F. Supp. 1563, 1576 (E.D. Pa. 1988). This case is such a case.

The general rule is that "removal actions are designed for short-term or interim cleanup measures, and remedial actions involve long-term or permanent measures." Hatco, 849 F. Supp. at 962 (citing United States v. Alcan Alum. Corp., 964 F.2d 252, 259 n.10 (3rd Cir. 1992)). See also Washington State Dep't of Transp. v. Washington Natural Gas Co., 59 F.3d 793, 801, n.6 (9th Cir. 1995). Stated another way, a removal action is "the immediate response to an emergency situation, the remedial action being a thought-out response, directed to a permanent solution and preventing future releases." U.S. Steel Supply, Inc. v. Alco Standard Corp., No. 89 C 20241, 1992 U.S. Dist. LEXIS 13722 at *26 (N.D. Ill. Sept. 9, 1992); see also National Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666 (Mar. 8, 1990) (stating that "removals are distinct from remedial actions in that they may mitigate or stabilize the threat rather than comprehensively address all threats at a site").

Courts examining the removal/remedial distinction have applied a variety of tests. Some courts focus on the urgency of the response action. Channel Master Satellite Sys., Inc. v. JFD Elecs. Corp., 748 F. Supp. 373, 385 (E.D.N.C. 1990). Other courts focus on the nature of the

response action, whether permanent or temporary. Versatile Metals, 693 F. Supp. at 1576. A number of courts apply a multi-factor test examining: (1) the cost and duration of a response action; (2) the exigency of the release or threat of release; (3) the complexity of the actions taken; and; (4) the nature of the actions taken. U.S. Steel Supply Inc., 1992 U.S. Dist. LEXIS 13722 at **28-29. See also Hatco, 849 F. Supp. at 963; Raytheon Constructors, Inc. v. ASARCO Inc., No. 96 N 2072, 2000 U.S. Dist. LEXIS 6069 at **43-46 (D. Colo. Mar. 31, 2000); G.J. Leasing, Co., Inc. v. Union Electric, 854 F. Supp. 539, 564-65 (S.D. Ill. 1994). Although Courts traditionally have applied these in private party actions, the rationale behind application of these factors applies equally to review of agency choice of response action.[1]

EPA does not dispute that it did not comply with the NCP provisions applicable to remedial actions. GSF ¶15. Importantly, EPA could not legally conduct remedial actions at Libby because it failed to list Libby on the National Priorities List ("NPL") until just recently. GSF ¶ 16. EPA can spend its remedial funds only on sites listed on the NPL. 40 CFR § 300.425(b) (2002). Thus, EPA had a motivation to stretch the limits of its removal authority however it could in order to spend funds at Libby – without having listed Libby on the NPL - and to avoid complying with the procedural safeguards applicable to remedial actions.

Examining EPA's actions under the multi-factor test, the facts show that the vast majority of EPA's actions were actually remedial actions that did not comply with the NCP and that EPA's actions at Libby were by and large not removal actions. For example, EPA's excavating 250,000 cubic yards of soil at depths of 13 feet, as well as the demolition of all of the structures

[1] 40 C.F.R. § 300.700(c)(5)(vi), which governs private party recovery actions, requires that private parties consider the same factors set forth in 40 C.F.R. § 300.415(b)(2) that an agency must consider in determining whether there is a threat warranting a removal response action.

on the Parker property were classic remedial actions.[2] The massive earth-moving projects (the cost of which exceed $25 million) bear no resemblance to any form of temporary action that might be taken to protect human health while an appropriate evaluation of risks, cleanup alternatives, and costs was conducted. GSF ¶ 32. Instead, EPA here spent $57 million and intends to spend another $53 million conducting a full remedial action without the legally-required procedural safeguards. GSF ¶¶ 9, 129. As such, EPA's response costs are not in accordance with law and are inconsistent with the NCP.

In addition to the permanency of EPA's actions, they were not removal actions because of their duration, cost, complexity, and type of risk being addressed. GSF ¶¶ 7-14, 17-39. So far, EPA has been at work in Libby for over three years and expects to be there much longer taking various actions. GSF ¶ 14. The actions taken and to be taken are hugely expensive ($110 million by EPA's own estimate). GSF ¶ 10. The actions have proven to be complex and not a simple removal of drums or putting a fence around a pile. GSF ¶¶ 23-28. By contrast, in Hatco the court found that removal of a 400- by 300-foot area of contamination, which was visually

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[2] During his deposition, EPA's On-Scene Coordinator took substantial time to explain the complexities of EPA's soil removal criteria – 18 inches under some circumstances, 4 feet under others, using laboratory analysis as the standard for some situations and in some others using visual observation for tiny chips of vermiculite. GSF ¶ 29.These criteria are dramatically different from those for the Export Plant. GSF ¶ 18. This discrepancy also shows the arbitrary and capricious nature of EPA's action. In addition, EPA has spent huge amounts bringing fill soil onto the Parker property only to remove it the next year and replace it. GSF ¶ 17. EPA did extensive work on the river front – installing thousands of cubic yards of rocks, steps down to the river, as well as completely re-doing the Rainy Creek streambeds through the Parker property, including new fish pools. GSF ¶ 17. As the court noted in Raytheon Constr., Inc. v. ASARCO, Inc., 2000 U.S. Dist. LEXIS 6069 at **54-60, rehabilitation, re-seeding and re-planting of creek channels, grading and compaction of soils in excavation areas, riparian restoration, and installation of storm water and sediment controls are activities that are permanent in nature and therefore remedial.

identifiable, was a simple task and therefore properly classified as a removal action. 849 F.Supp. at 963. The vast majority of EPA's actions in Libby are remedial actions, and as such are subject to legal requirements with which EPA admittedly did not comply. Thus, EPA's actions are arbitrary and capricious and not in accordance with applicable law.

II. EPA's Exceeding the $2 Million/12-Month Statutory Limit on Removal Actions Was Arbitrary and Capricious and Not in Accordance with the Law.

The Superfund Amendments and Reauthorization Act of 1986 ("SARA") made removal actions subject to a $1 million statutory limit and required that they be completed within 6 months of initiation. Pub. L. No. 99-499, § 1, 100 Stat. 1613 (1986). Later, Congress increased the removal spending limit to $2 million and the time limit to 12 months. 42 U.S.C. § 9604(c)(1). By law, these limits may be exceeded only under exceptional circumstances, such as if "(i) continued response actions are immediately required to prevent, limit, or mitigate an emergency [and] (ii) there is an immediate risk to public health or welfare or the environment." Id. (emphasis added). See also 40 C.F.R. § 300.415 (b)(5). As stated in the Congressional Report:

> In granting the flexibility to apply increased limits in structuring emergency removals, and granting exceptions even to those limits in unusual cases, we do not intend to encourage any shift in the focus of the program toward such activities. Removal should remain interim and relatively short-term and inexpensive actions or urgent responses, which consume a small portion of Superfund resources. The new, more flexible authority is not to be abused to circumvent the more rigorous and explicit requirements regarding public participation and health standards. Finally, while the President is accorded greater flexibility in undertaking removals, the law's fundamental requirement that human health and the environment be protected must nonetheless be satisfied. The flexibility is merely procedural in nature, not substantive.

99 Cong. Rec. 14896 (daily ed. Oct. 3, 1986) (statement of Mr. Stafford, Chairman of the Committee on Environment and Public Works).

EPA On-Scene Coordinators prepare Action Memoranda that "must document consideration of the factors affecting the removal decision" and "substantiate the need for a removal action based upon criteria in the ...NCP [300.415(6)(2)]," even when not seeking an exemption from the cap. EPA, Action Memorandum Guidance at iii (Dec. 1990) (OSWER 9360.3-01), Exh. A. Here, the Action Memoranda failed to provide critical information, causing the approval of them without EPA's having considered the relevant factors and based on blatant misinformation. See, e.g., GSF ¶¶ 71-73. Thus, the selection of those response actions were inconsistent with the NCP.

The content and the accuracy of EPA's three Action Memoranda are even more important because they served the function of purportedly documenting the basis for exceeding the $2 million/12 month removal action ceiling. EPA now seeks to use these three incomplete, misleading, and error-filled Action Memoranda to justify its exceeding the ceiling and to preclude this Court from an appropriate review of EPA's actions. EPA's guidance emphasizes the different, higher standard that applies to exceeding the ceiling and obtaining the desired Emergency Exemption. "Note that a higher threshold is used to evaluate emergency exemption requests than for responses within statutory limits or consistency exemptions." Action Memorandum Guidance at 28. The EPA Guidance highlights the emergency, immediate nature of the risk that must be present in order to satisfy this statutory exemption. In discussing the required boiler plate section titled "There is an immediate risk to public health or welfare or the environment," the Guidance emphasizes: "the key word, being immediate: focus on how soon the public or the environment is at risk or will be in the immediate future. Describe site conditions that constitute an immediate risk...define the immediacy of the risk to affected human populations." Id. In contrast to the situation here, the examples in the Guidance Document are

very immediate emergencies: a lagoon, which contains 20,000 gallons of waste with the lagoon wall, expected to collapse within 4-6 weeks. Id.

EPA nationwide has adopted a policy that cancer risks in the range of 1 out of 10,000 (which is expressed as 10^{-4} or sometimes as 10E-4) to 1 out of 1,000,000 (10^{-6} or 10E-6) are acceptable and do not require EPA CERCLA action. 55 Fed. Reg. 8694, 8717 (Mar. 8, 1990). Here, initially EPA acted consistently with this national policy by adopting in its Sampling Quality Assurance Project Plan ("SQAPP") a decision rule that stated that it would only consider actions if risks were greater than 1 out of 1,000 or 10^{-3}. GSF ¶ 125. But then, despite this national policy and despite the SQAAP, at Libby EPA took action here under the guise of a public health emergency when the risks were within the EPA defined acceptable range. GSF ¶¶ 107-108.

EPA's Action Memoranda fail to mention the absence of human receptors – of actual people who could be exposed to asbestos – at either the Bluffs or the Flyways. GSF ¶¶ 71, 73. EPA does this sleight of hand by defining the Screening Plant as including both the Bluffs and the Flyways and then discussing the Parkers who live at the Screening Plant. GSF ¶ 49. By EPA's own estimates they spent well in excess of $5 million under a supposed Emergency Exemption digging up property where no one worked or lived or otherwise had any immediate way to come into contact with asbestos. EPA dug up the forest and now wants Defendants to pay. Had EPA done an EE/CA they would never have incurred these costs. Similarly, once EPA fenced the Parker property and relocated the Parkers there was no emergency to take any further action until a proper EE/CA or remedial evaluation was done.

EPA's Second Action Memorandum proposed expanding the Emergency Exemption at the Screening Plant as well as to numerous other properties was based on flatly incorrect

statements of the sampling data. Second Action Memorandum at 19; GSF ¶¶ 115, 116. In his deposition, when confronted with the overstatement of the data by a factor of 3.6, Chris Weis, whose risk assessment EPA used to justify its Second Action Memoranda, could not provide any explanation for the overstatement. GFS ¶ 115. This incorrectly-stated result was the only direct preparation sample and thus was the only basis for his risk assessment. GFS ¶ 115. All of the other samples were indirect preparation, which, as discussed, below cannot be used. GFS ¶ 115.

EPA's Third Action Memorandum was based on incredible errors in the data and in the resulting calculations, as EPA finally, begrudgingly admitted in September 2002. GFS ¶¶ 102, 116. EPA, despite its public *mea culpa* on the fatally flawed data, still has failed to provide to this Court, place in the Administrative Record, or provide to Defendants the revised risk calculations that underlie its Third Emergency Exemption request. GFS ¶¶ 103, 131. However, Defendants' experts have recalculated the risks and they are within EPA's national policy of acceptable risk. GSF ¶ 107. Thus EPA's use of those data and miscalculated risks as the basis for its Emergency Exemption (and even for any removal actions) is arbitrary and capricious.

Defendants' expert reports, including their discussion of the documents in the Administrative Record, of the issues that EPA failed to consider, the glaring errors made by EPA, and EPA's extensive failures to comply with its own policies, provide a more complete view of why EPA's actions were arbitrary and capricious and not in accordance with the law – especially as to EPA's exceedance of the $2 million/12 month cap. GFS ¶¶ 3, 5. No public health emergency or immediate risk existed in Libby in 1999-present. EPA's Action Memoranda and Administrative Records cannot change this reality. EPA abused its discretion in order to circumvent the rigorous requirements that would have safeguarded Defendants' rights.

III. EPA's Decision To Initiate As "Time-Critical" Removal Was Arbitrary and Capricious and Not in Accordance with Law.

EPA Guidance states that "experience has demonstrated that not all actions classified as removals under the NCP will be equally urgent. For example, situations involving fire/explosion or imminent, catastrophic contamination of a reservoir may require more prompt and expeditious attention than certain drum removals or cleanups of surface impoundments." EPA, Superfund Removal Procedures (1988) at III.5 (OSWER Directive 9360.03B), Exh. B. EPA then provides three types of removal actions: classic emergencies, time-critical, and non-time critical. The Guidance emphasizes the importance of determining "how urgent the response is (i.e., the maximum time that may elapse between approval of the action and initial response without posing additional significant risks to human health... .) Id. This estimate is essential for determining ...whether an EE/CA must be conducted." A non-time-critical removal action occurs when there is a planning period of at least six months before on-site activities must be initiated at a site. 40 C.F.R. § 300.415(b)(4). Where a non-time-critical removal action is undertaken, EE/CA must be prepared. Id. § 300.415(b)(4)(i). In the instant case, by characterizing its actions as a time-critical removal, EPA attempted to avoid having to prepare an EE/CA and sought to minimize its evaluation of risk before launching its now $110 million response action. EPA's position on its failure to prepare EE/CAs for the various areas of concern at Libby (e.g., the Bluffs, the Flyway, the Parkers property, etc.) is particularly egregious. **The EPA On-Scene Coordinator admitted in his deposition that he never even considered preparing one**. GFS ¶ 128. The fundamental procedural safeguards provided for removal actions – that of an evaluation of alternative actions and assessments of costs – was not even considered by EPA at any time at Libby. EPA has been taking actions at Libby now for

three years. GFS ¶¶ 11, 12. EPA would like this Court to rubber-stamp their failure to at any time, even during the three winters that have now passed, to prepare EE/CAs as required by law.

IV. The United States' Motion Repeats the Errors in Its Decision-Making Process at Libby and Continues to Create Strawmen Rather Than Accurately Stating Defendants' Positions and Responding to Those Legitimate and Fundamental Positions on the Role of Historic Exposures, Evaluation of Risk, and Scientifically Unacceptable Analytical Work by EPA

As presented in Defendants' expert reports and in those experts' depositions, Defendants have serious, substantial, and legitimate bases for its position in this case that EPA's actions were arbitrary and capricious or otherwise not in accordance with the law. However, when discussing Defendants' positions on these issues, the United States repeatedly misstates Defendants' position, sets up strawmen, and then addresses those imaginary positions instead of those that the Defendants are actually taking.

A. EPA's Use of Historic Exposures and Associated Disease Demonstrate Its Failure to Comply with the NCP and Applicable Law

Unlike the situation during the decades of operations in Libby, EPA has in the last 15 years developed scientifically-accepted methodologies for quantifying the risks presented by asbestos exposure. GFS ¶ 112. These methods draw upon the extensive and peer-reviewed scientific literature on human epidemiology studies, including three conducted historically in Libby. GFS ¶ 113. These studies provide the basis for EPA's development of an asbestos "slope factor" in its Integrated Risk Information System ("IRIS") – a system that EPA uses nationwide for a wide variety of compounds in calculating risk and determining whether exposures are "acceptable"or "unacceptable." GFS ¶ 114. In our society, we are subject to risks in thousands of ways in our daily lives – in breathing the air pollution from our cars and from breathing benzene (a known liver carcinogen) whenever we fill our cars with gasoline. Some risks we impose upon ourselves (self-serve gasoline) and others are imposed upon us (air pollution). We

look to EPA to determine in a fair and scientifically-based manner which risks are acceptable and which are not. When EPA did its investigation in late 1999 through the present in Libby, EPA allowed the past tragedies of high exposures (now being manifested 20 – 40 years later) to obscure its responsibility to determine fairly and scientifically the current exposures and the current risks and whether they were acceptable under EPA policies. As a result, EPA failed to do what we rightly expect of it and that which it must do by law.

In all of its Action Memoranda and throughout its Administrative Records, EPA spends much time discussing the historic exposures that occurred while the mine and other facilities operated. Historic concentrations were in the range of 1,000 times higher than those in 1990-present. GFS ¶¶ 89,90. EPA however fails to use those historic exposures in a scientifically-accepted manner. GFS ¶ 88. At Libby, EPA failed to use its own risk calculations and risk methodologies for decision making and instead simply took the unique position, contrary to its own policies, that the mere presence of asbestos is an unacceptable risk. GFS ¶ 30,.97. Nothing could be further from the truth. **Defendants in this case are entitled to have the United States apply its policies and risk methodologies even-handedly and not to be subject to an ad hoc "special Libby-only" punitive government action. As demonstrated by EPA's own regulations and defendants' expert reports, especially that of Suresh Moolgavkar, Libby asbestos is no more toxic than any other form of asbestos to which EPA applies its IRIS methodology.** GFS ¶ 121. The United States' failure to properly use its own scientifically-accepted risk paradigm, discussed by Dr. Anderson in both her expert report and her deposition, renders EPA's actions at Libby arbitrary and capricious and not in accordance with law.

EPA also relies upon the ATSDR Mortality and Screening Studies. Again, however, these studies do not provide information about the present exposures or the actions that should be

taken. GFS ¶¶ 93-96. These studies document the consequences of the unfortunate history of Libby – a history which occurred before EPA and the scientific community developed the national polices, scientific methodologies and expertise to quantify and assess risk in the manner that now can be done. Id. The ATSDR studies do not address the present exposures or the present risk. Use of them by EPA to justify its response actions is arbitrary and capricious and inconsistent with EPA's policies and guidance.

EPA also makes an outrageous argument that Defendants wish to "wait and see" what health results are produced by current exposures in Libby, a course of inaction that, according to EPA, would result in tragic, avoidable deaths. Pl. Br. at 16. This false *ad hominem* attack demonstrates the very problem that brought Defendants to this Court rather than reaching a resolution – the United States refuses to consider the scientific issues raised by Defendants. Instead, throughout the last three years, the United States has seen fit to mischaracterize Defendants' positions in this inflammatory manner. Environmental science has provided tools for determining current exposure levels, and for calculating health risks based on these exposure levels. Defendants had every reason (and the right) to expect that EPA would use these methodologies. EPA did not.

B. EPA Arbitrarily and Capriciously Relied upon Flawed and Erroneous Methodologies

A significant reason behind EPA's conduct and mischaracterization of the risk at Libby is that EPA failed to perform its sampling and analysis functions properly. As described in the GSF, EPA's underlying data are fatally flawed and despite numerous attempts EPA still does not have an accurate database of its sampling and analytical results. Its data are the antithesis of science – they are non-reproducible, ignored or dismissed by EPA when inconvenient, and misinterpreted by EPA in its quest to use its amphorphous "special Libby approach." EPA

breezily dismisses Defendants' well-founded objections and comments on EPA's sampling, analytical results, data reporting, and data interpretation. However, two of the foremost asbestos analysts in the world have offered expert reports in this case, including statements by Eric Chatfield, the analyst who developed the very method that EPA relies upon, that EPA is flat wrong. Apparently, EPA believes that its off-hand dismissal should suffice for the Court's review. However, as the Ninth Circuit has noted, a Court "cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980).

A few of the numerous fundamental errors made and flawed methodologies used by EPA are the following:

1. EPA has now admitted pervasive errors in its "All-PCME" database table and subsequent risk calculations for the residential scenarios presented in the December 2001 Weis risk memorandum, on which EPA based its Third Action Memorandum. GFS ¶ 102. Despite admitting these errors, however, EPA coyly failed to provide revised risk calculations – instead choosing to characterize the differences as "non-trivial." GFS ¶ 117. This gamesmanship does not speak well of an agency that seeks to have this Court defer to its scientific expertise. Defendants' expert, Elizabeth Anderson, was able to make the revised calculations based on the revised data and submitted them to this Court. Anderson Expert Report, September 2, 2002.

2. EPA supported its risk assessments in its Second Action Memorandum on data produced by indirect sampling. GFS ¶ 115. On October 22, 2002, Judge Randall J. Newsome of the United States Bankruptcy Court for the District of Delaware issued a Findings of Fact and Conclusion of Law in In re Armstrong World Industries, Case No. 00-04471 (RJN), in which he found, as a matter of law, **that methods to correlate levels of asbestos found in dust with**

respirable fibers in the air through the use of indirect sampling were not scientifically valid ways to quantify the level of asbestos contamination in a room, and thus were inadmissible under the Daubert standard.

3. EPA counted cleavage fragments in its fiber counts and used those higher counts in its IRIS calculations even though EPA elsewhere acknowledged that cleavage fragments should not be counted in using IRIS. GSF ¶ 111.

IV. Defendants Have Strong Basis for Their Third Defense – In Fact, EPA's Actions Were Inconsistent with the NCP.[3]

Under the NCP, EPA is required to consider the factors listed in 40 C.F.R. § 300.415(b)(2) before it can determine pursuant to 40 C.F.R. § 300.415(b)(1) that there is a threat to public health or welfare or the environment. In the instant case, EPA has not provided the factual bases for its actions in the Administrative Record, and has relied instead upon conclusory statements. Two examples of many follow.

In its Motion, EPA cites its analysis of the threat to human health in the Second Action Memorandum as an example of its method of applying facts to 40 C.F.R. § 300.415(b)(1). Pl. Br. at 11. In the example, EPA cites its sampling data which showed amphibole asbestos concentrations in surface soils at Plummer Elementary School between 3% and 8%. Id. Plaintiff also claims that EPA personnel observed children in that area. Id. Then, rather than making a rational connection between the existence of asbestos fibers in soil and a health risk to children,

[3] In addition, EPA acted inconsistently with the NCP in various matters associated with its costs, including documentation, indirect costs, and specific actions as discussed at length in Defendants' Response to the United States Motion re Response Costs. EPA also violated Defendants' procedural due process rights. See generally, United States v. Iron Mountain Mines, Inc., 987 F.Supp. 1250 (E.D. Cal. 1997).

EPA makes a conclusory statement that "there is substantial information in the admin record that disturbance for contaminated soils can cause asbestos fibers to become airborne." Id. EPA supports this conclusory statement with a reference to a supposedly "uncontroverted fact" A.R. Fact 39, which in turn, repeats the above conclusory statement and cites to the August 17, 2001 Action Memorandum Amendment ¶ 15. The cited paragraph of the Action Memorandum Amendment merely restates the same conclusory statement. This circular litany of citations does not lead to any supporting facts or demonstrate any rational connection between the facts cited by EPA and the response action selected. Chris Weis admitted in his deposition that he did not use PLM asbestos counts from soil for the purpose of risk assessment, and that there was no correlation between dust samples and air samples. GSF ¶¶ 83, 127. The admitted lack of any correlation between soil asbestos and airborne asbestos (and thus to risk) is a critical fact at Libby. EPA took action based on soil concentrations even while admitting no correlation to exposure or risk. This discrepancy is a key failure by EPA.

EPA also undertook actions that bore no relation to their own claims of a threat. At the Screening Plant, EPA excavated soil to a depth of 13 feet in some areas. GSF ¶ 31. However, Weis, the Regional Toxicologist, stated in his deposition that "what's 4 feet down doesn't really interest me in terms of risk calculations." GSF ¶ 118. Paul Peronard stated in his deposition that he had no idea what difference it would make in terms of risk by taking off the top foot of soil as compared to the top two feet, the top three feet, or the top four feet. GSF ¶ 119. In other words, EPA had no basis or rationale for excavating soil to the depths the excavated in Libby, yet did so anyway. These excavations are the very definition of arbitrary and capricious, and Plaintiff should not recover any costs associated with such actions.

Conclusion

For the reasons set forth above, substantial material issues of fact remain regarding whether EPA's actions were not inconsistent with the NCP. Grace has presented substantial evidence both from the administrative record and in the form of expert testimony that shows that EPA failed to articulate a rational connection between the facts found and the choices made, failed to comply with its own policies and regulations, and acted in an arbitrary and capricious manner or otherwise not in accordance with applicable law.

WHEREFORE, Defendants respectfully request that the Court deny the United States' Motion for Partial Summary Judgment on Defendants' Third Affirmative Defense.

Respectfully submitted this 31st day of October 2002.

Linnea Brown

Linnea Brown
HOLME ROBERTS & OWEN LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
(303) 861-7000

GARLINGTON, LOHN & ROBINSON, PLLP
199 W. Pine, P.O. Box 7909
Missoula, MT 59807-7909
(406) 523-2500
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2002, true and correct copies of the foregoing **DEFENDANTS' RESPONSE TO UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' THIRD AFFIRMATIVE DEFENSE** were served to the following via:

Hand Delivery:

Walker Smith, Deputy Chief
Environmental Enforcement Sec.
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

James D. Freeman, Trial Attorney
Heidi Kukis, Trial Attorney
David Askman
Environmental Enforcement Sec.
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

John C. Cruden
Acting Assistant Attorney General
Environment & Natural Resources Div.
U.S. Dept. of Justice
999 Eighteenth Street, Suite 945-NT
Denver, CO 80202

Matthew D. Cohn
Andrea Madigan
Enforcement Attorneys
U.S. EPA Region 8
999 Eighteenth Street, Suite 300
Denver, CO 80202

Overnight Mail:

William W. Mercer
United States Attorney
Victoria Francis
Assistant United States Attorney
District of Montana
2929 Third Ave. N., Suite 400
Billings, MT 59101

Katherine Louis Coggon